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No. 1019

In the Supreme Court of the United States

OCTOBER TERM, 1969

GEORGE BRAVOS, JOSEPH LOMBARDI, SAM MERCURIO and WILLIAM MESSINO,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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Petitioners pray that a writ of certiorari be issued to review the judgment of the Appellate Court of Illinois, First Judicial District, entered in this cause on September 9, 1969.

OPINION BELOW

The opinion of the Appellate Court is not reported, but is reprinted herein as Appendix A, *infra.*

JURISDICTION

The judgment of the Appellate Court (Appendix B, *infra*) was entered on September 9, 1969. A timely petition for rehearing was denied on October 7, 1969 (Appendix C, *infra*). A timely Petition for Leave to Appeal to the Illinois Supreme Court from the judgment of the Appellate Court was denied on November 24, 1969 (Appendix D, *infra*). Petitioners' motion to stay the mandate of the Illinois Supreme Court pending filing and disposition of this Petition was granted by Justice Walter V. Schaefer of the Illinois Supreme Court, sitting in vacation. (Appendix E, *infra*). This Petition is filed within 90 days of the final order of the Illinois Supreme Court denying leave to appeal. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether it is coercive, and thus a denial of petitioners' Sixth Amendment rights to trial by jury and their Fourteenth Amendment rights to a fair trial under due process of law, for the trial judge to return a jury for seven hours further deliberation after he has received unsolicited advice from the jury foreman following approximately eight hours of deliberation that the jury is "completely deadlocked" eleven to one for conviction, and the one juror "just * * * [does not] believe the case was proven?"

2. Whether it is a denial of petitioners' Sixth Amendment rights of confrontation and cross examination and their Fourteenth Amendment rights to a fair trial under due process of law for the trial judge to deny motions for a severance from a confessing co-defendant, when the

prosecution, during rebuttal, introduces evidence of a confession, made three months after the charged substantive offenses and narrative of past events, which implicates and incriminates the objecting petitioners?

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *; to be confronted with the witnesses against him; * * *"

The Fourteenth Amendment to the Constitution provides in pertinent part:

> "No State shall * * * deprive any person of life, liberty, or property, without due process of law; * * *"

STATEMENT

Petitioners Bravos, Lombardi and Messino were indicted by the Grand Jury of the Circuit Court of Cook County for, and subsequently convicted after joint trial by jury of, the offenses of kidnapping (two counts), aggravated battery (two counts), and conspiracy. Petitioner Mercurio was jointly indicted for the crimes of conspiracy and kidnapping, tried together with the others, and convicted of the conspiracy, but acquitted of the kidnapping charges.[1] Bravos was sentenced to the Illinois State Penitentiary for various terms aggregating a minimum of five and a maximum of twenty years; Lombardi was sentenced to the penitentiary for terms aggregating a minimum of seven and a maximum of twenty years; Messino was sentenced to the penitentiary for terms aggregating a minimum of ten and a maximum of thirty years. Mercurio was sentenced to a period of five years probation, conditioned upon incarceration in the Cook County Jail for thirty days.

Evidence

Background

In June 1964, S. George, Albert and Jack Chiagouris, brothers and co-partners in a construction business, arranged to borrow $50,000 from Messino and Bravos. At the time, Albert asked Bravos what security would be required, and Bravos replied, in a manner similar to what the brothers had heard from bankers and which did not terrify or otherwise intimidate the brothers, "The only security we want is your eyeballs." (A. 102-4, 179, 206-7, 248)[2] Following a discussion, Messino said the interest

[1] Two co-defendants, Sander Caravello and Alice Erwin, named in the conspiracy count and the conspiracy and kidnapping counts, respectively, were acquitted by direction of the trial judge during trial.

would be $70,000 and, together with the principal, would be payable over a 47-week period at the rate of $1,500 per week for 46 weeks and $1,000 in the 47th week. (A. 104, 207) Two days later, when they received the loan, the brothers were introduced to Lombardi whom Messino said would receive their repayments in the event he were not available. (A. 105-6, 208)

At the end of July 1964, the brothers arranged to borrow an additional $100,000 for 105 days from Bravos and Messino. They were told this loan would cost $30,000; installments of $10,000 were to be paid after the 35th and 70th days and a final payment of $110,000 was to be made at the conclusion of the 105-day period. (A. 108, 211-2)

In individual and partnership financial statements submitted to various financial institutions at the end of 1964 and the beginning of 1965 for the purpose of obtaining other loans, the Chiagouris brothers failed to list either of these alleged loans, or the indebtedness represented thereby. (A. 322-3) These statements, dated November 30, 1964, purported to contain an enumeration of the brothers' assets and liabilities as of that date; each contained the legend that it was "a true and accurate statement" of the signator's financial condition. (A. 317-8, 327-8)

According to the Chiagouris brothers, repayment on the first loan commenced immediately following its receipt. (A. 107-8, 213) The payment due on October 9, 1964, was not made. On October 10th, they had a meeting with Messino

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[2] "A....." references are to the page of the printed "Abstract of Record" prepared and filed in the State court pursuant to Illinois appellate practice (see, Ill.Rev.Stat.1967, Ch. 110A, par. 342(e)), a copy of which has been certified to this Court by the Clerk of the Appellate Court of Illinois, First Judicial District.

during which Messino cursed them and hit Jack. They then made the $1,500 payment, after which they discussed with Messino their inability to make the impending second payment on the second loan, the first payment having been made in September. After some discussion, Messino told the brothers they would be charged a penalty of $1,000 a day for every day they were late in making this second payment. The brothers claimed they made the payment two days late. (A. 110-2, 214-5)

In November 1964, the brothers met with Petitioner Mercurio to discuss his assistance in obtaining financing for them. According to George, Albert told Mercurio privately of their need for funds to repay the second loan. (A. 212) Albert did not testify to this conversation. Jack said he told Mercurio of their indebtedness. (A. 215) Jack could not remember whether their attorney was present at this meeting. (A. 188) Albert said their attorney was never present at a meeting with Mercurio. (A. 317) The attorney, an Assistant Corporation Counsel for the City of Chicago, testified that he was present at a meeting between the Chiagouris brothers and Mercurio which he thought took place in the fall or late summer of 1964. The location and general subject of the meeting described by the attorney was the same as that described by the brothers, except that the attorney denied there was any conversation concerning a loan from Messino and Bravos, or that any one of the brothers took Mercurio aside for a private conversation. (A. 282-3) Mercurio, too, denied that any conversation concerning the loans from Messino and Bravos occurred at this meeting. (A. 355-6)

A few days later in November the brothers met Messino, Bravos and Lombardi at a cocktail lounge. The brothers said they did not have the final payment on the second loan. Messino asked Bravos if he knew the brothers had given

$40,000 from their loans to Sander Caravello (a co-defendant acquitted by direction of the trial judge). He then asked for permission "to take these fellows out and put a bullet in their head." (A. 113, 216) Bravos told the brothers they would pay $10,000 interest every thirty days until they paid the $100,000 principal. Lombardi was instructed to get Caravello. Before he returned, Bravos left the lounge. When Caravello returned with Lombardi, according to Jack and George Chiagouris, he was threatened and beaten by Messino. (A. 113-4, 216-7) Although the cocktail lounge was fairly crowded at the time, and the tables were closely spaced, no one interceded or made any inquiry. (A. 253, 276) Of the persons present in the lounge on that occasion, only Jack and George Chiagouris testified to the alleged incident.

Payments on the two loans were allegedly made to Messino and/or Lombardi during the following months. (A. 114, 131, 217-8) In February the brothers told Lombardi they would be unable to make the payment on time, and Lombardi placed a long distance call to Messino, who told George, over the phone, that he would fly to Chicago "to get this thing straightened out" if the payment were not made. (A. 132) The payment was made a few days later. (A. 133, 220)

In the middle of March, 1965, George and Jack met Messino and Bravos. On hearing that the brothers did not have the $100,000 with which to pay off the second loan, Bravos and Messino threatened to choke the brothers and demanded that the money be paid. A request for a moritorium was rejected. (A. 134, 220-1)

Substantive Offenses

The brothers were unable to make the payment which was due on May 7, 1965. They went out of town that day

and then called Messino at the "Wow" Restaurant. Messino ordered them to return to Chicago. They drove to the Chicago Loop where Albert left his two brothers to return home. Jack and George went to the restaurant where they met Lombardi, Messino and Bravos in a picnic area adjacent to the restaurant. (A. 136, 223, 308) The restaurant, located less than two blocks from a police station, was well-lighted; the picnic area was also lighted. A number of people were inside the restaurant; several people sat on a bench in the picnic area approximately fifteen to twenty feet from where the brothers and the Petitioners sat. (A. 181-2, 273-4, 386) Defense witnesses said the area was well lighted and occupied by a lot of people. (A. 386, 429) Although Jack Chiagouris "imagined" these people witnessed the incidents which followed and both brothers said they cried out when hit, no one came to the brothers' assistance, or otherwise intervened. (A. 182, 274) Only Jack and George Chiagouris testified for the State as to what occurred.

After a discussion as to Albert's whereabouts and the failure of the brothers to make a payment on the loans, Messino and Lombardi allegedly struck and beat both Jack and George, causing bruises, bleeding and a disarray of clothing. (A. 136-8, 223) Jack claimed he suffered a broken jaw as a result of the beating, but, when he first visited his dentist ten days later, on May 17th, he told the dentist that he had been injured at a construction site when a laborer had accidentally hit him with a board. The dentist opined that this injury had been incurred sometime after May 10th. Jack also told a doctor who treated him on May 19th or 20th that he had been injured ten days earlier by a carpenter who had hit him with a board. (A. 234, 278, 283-5)

After the brothers made two unsuccessful attempts to telephone Albert at their home, Bravos told them they would not be let loose until they provided security for the money they had borrowed. (A. 137-8, 223-4) George then said they had a beneficial interest in a trust which they could assign as security. Bravos agreed and said they would have Mercurio receive the assignment of the beneficial interest. (A. 138-9, 224) Later that night, Mercurio arrived at the picnic area and was told the brothers were going to assign their beneficial interest in a trust to him. Bravos told him to contact Albert Chiagouris and make arrangements at the bank for the next day. (A. 139)

According to Albert, he talked to Mercurio by telephone several times that evening, inquiring as to the whereabouts of his brothers and their well-being. He said Mercurio told him they were with Bravos and Messino, that they had been slapped around a little, and that he was going to receive an assignment of their trust interest the next day as security for the money they owed Bravos and Messino. (A. 308-10, 318)

In the meantime, Lombardi and Messino took Jack and George to a cocktail lounge. Bravos joined them there. Again, both brothers tried to call Albert at home, but were unsuccessful. (A. 139-41, 226) From the cocktail lounge, Messino drove both brothers to Miss Erwin's apartment. They remained there for approximately thirty minutes, and then went to Messino's home. Later that morning, Lombardi arrived at the home and the four men drove to Caravello's office where Messino made a telephone call. Messino then told the brothers that everything was arranged at the bank for the brothers to assign their interest and they were free to leave. (A. 142-5, 226-31) Lombardi drove the brothers to the Wow Restaurant, where the brothers picked up their car and drove to Savings & Loan Association to

meet Mercurio. (A. 145, 231) Mercurio and the two brothers drove to the bank where they were met by Albert and the bank's trust officer. All three brothers described George's and Jack's appearances as disheveled, unshaven, bloody, and showing evidence of bruises about the head and face. (A. 145, 232, 311) A secretary at the Savings & Loan testified that one man with a bruised and swollen face, whom she could not again recognize, asked to see Mercurio in his office on the morning of May 8, 1965. This man was "about the same" size, weight and build as Jack Chiagouris. (A. 450-1, 454) The bank trust officer, however, noticed nothing unusual about the three brothers at the time they assigned their trust interest to Mercurio, except that *Albert* appeared slightly disheveled. The brothers made no objection to the assignment in his presence. (A. 443-6)

Events Subsequent

On May 11th the brothers renegotiated the schedule of payments on the remaining money which they claimed they had borrowed. (A. 149-51, 233-34) On May 21st they paid off the first loan. (A. 151, 233) On June 2nd, however, they borrowed $15,000 from Messino which was to be repaid in 90 days with interest of $800 a month. (A. 152, 234-5)

The brothers made their first complaint to the authorities on July 28, 1965, when they were taken to the Illinois Crime Investigating Commission by their lawyer. (A. 155, 158, 166-7, 272) Thereafter they were accompanied or observed by agents of the Commission as they made various payments to Lombardi (A. 160-1, 236, 239-40, 335-6), although these agents were unable to say what amounts of money were paid at the times. (A. 336, 343)

On August 7, 1965, George Chiagouris called Lombardi and asked to postpone a payment until the following week.

This call was monitored by an agent of the Commission. During the call, Lombardi allegedly threatened George, and the two arranged to meet at a downtown hotel later that evening. Commission Agent Walker accompanied George to the meeting and, as he had on a prior occasion, posed as George's brother-in-law. Messino and Lombardi met George, Jack and Walker in the lobby of the hotel. Lombardi remained with Walker,[3] while Messino went into the cocktail lounge with George and Jack. They were joined there by Bravos. George was seen by another agent to slip money under a cocktail table to Messino. (A. 162-4, 241-2, 288-9, 337, 403-4, 461-3)

Defense Testimony

Petitioners Mercurio and Lombardi testified in their own behalf and denied the charges. Both explained that they had gone separately to the Wow Restaurant on May 7th for reasons unconnected with Messino or Bravos or the Chiagouris brothers. Mercurio denied seeing any bruises on the brothers at that time or on the following morning, and explained that he had received their trust interest as an accommodation to the brothers. (A. 362-4) Lombardi went to the restaurant to meet a friend, Gus Baltas, who also testified for the defense. Both Lombardi and Baltas denied that Lombardi was with Messino and Bravos, or the two Chiagouris brothers, that there was any commotion in the picnic area, or that the brothers appeared disheveled or bruised or restrained in any manner. Lombardi and Baltas went to the cocktail lounge after leaving the restaurant, but they left the lounge and remained together until 2:00 a.m. (A. 386-9, 428-31)

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[3] Lombardi was cross-examined and the State introduced rebuttal evidence concerning Lombardi's conversation with the agent at this time. See Statement, p. 12 *infra*.

Statement by Lombardi

Lombardi was cross-examined about a conversation he had with agent Walker while waiting for the Chiagourises in the lobby of the hotel on August 7th. (See *supra*, p. 11.) Lombardi said the two of them engaged in small talk during this time. He denied Walker told him he was worried about his brother-in-law and did not want George to get a broken jaw as had Jack. Lombardi said that Walker did not ask him why he had to be so rough on Jack, and he did not reply that it was only a broken jaw and could have been a lot worse. Finally, he denied he told Walker he had certain ways of collecting money and did not deviate from them, and that he had slapped Jack and George around a bit. (A. 422)

Prior to this cross examination, but after trial had commenced, the State disclosed that Lombardi had made an oral statement to an agent of the Commission and successfully excused its failure to give prior notice by moving to expunge an order entered in pre-trial proceedings some five months previous directing the State to furnish counsel for the defendants "with a list of witnesses and copies of any written or oral statements in each cause." (A. 10, 25-6, 70) At this time, counsel for all Petitioners other than Lombardi moved for a mistrial and severance from Lombardi and for a severance of the conspiracy count from the substantive counts of the indictment. (A. 70, 81-3) The motions were denied. (A. 83) A renewed motion for a severance of the parties was again denied. (A. 91-4) Thereafter, to forestall further motions for severances, the State mooted the question by assuring the court that Lombardi's confession would not be used, "thereby removing a basis for the motion for severance," according to the trial court. (A. 407)

The motions for severance of parties and counts were renewed after the trial court overruled objections to the foregoing line of cross examination. (A. 407-8, 413-4)

The foundation having been laid by the cross examination, Walker was permitted to testify, on rebuttal, that, while he and Lombardi sat in the lobby of the hotel on August 7th waiting for the Chiagouris brothers and Messino, he asked Lombardi if there were not a way in which the loan could be paid off in one payment. Cautioned by the prosecutor not to name whose responsibility it was, Walker testified that Lombardi answered "it wasn't his responsibility" for setting a figure. Walker asked Lombardi if he had been "involved in" and "participated in" the beating of Jack and George in May. Lombardi said he did. Walker said he could not see the reason for it as they had been trying to repay the loan. Lombardi replied "they" had certain ways to collect and "they" didn't deviate from those methods. Walker said he did not want George to get a broken jaw like Jack got, and Lombardi said "Well, it was only a broken jaw, it could have been a lot worse." (A. 463)

Subsequent to Walker's testimony, the court instructed the jury that the evidence was to be considered by them "for the limited purpose of having you decide whether or not Joseph Lombardi has made out of court statements inconsistent with his testimony." The jury was also instructed that Walker's testimony "should not be considered for the purpose of establishing the truth of the facts related in the alleged conversation," and that "it was offered for impeachment purposes only." (A. 468)

Conduct of the Jury's Deliberation

Although the trial of this case took place over a span of nine weeks, only seventeen trial days were consumed in

hearing testimony. Of the seventeen witnesses who testified for the State, only two, Jack and George Chiagouris testified concerning the substantive offenses alleged to have been committed on May 7th. Albert Chiagouris testified to various conversations with Mercurio on that night. The remaining prosecution witnesses testified to observing various other meetings between the parties, or some of them, to certain alleged threats and statements by Lombardi on August 7th, and to other collateral matters.

The case was given to the jury at dinner time on Friday. The jury continued to deliberate through Friday night until 2:15 Saturday morning. (A. 496-9) They resumed deliberations at 10:00 A.M. Saturday and, one hour later, returned into open court where the following occurred:

> "The Court: Good morning Mr. Foreman?
>
> "The Foreman: Your Honor, we are no further. We are completely deadlocked, eleven and one. We are no further than we were last night at midnight, no further along, and there's nothing we can do about it. The party just don't believe the case was proven. * * *
>
> "The Court: You may retire to the jury room." (A. 500)

Immediately thereafter, counsel for Petitioners, expressing a fear that further deliberation would prove coercive on the juror who did not "believe the case was proven," moved for a mistrial. The motion was denied. (A. 501-3) At mid-day, the jury returned into open court and, in answer to an inquiry from the Court, said they were making progress and further deliberation would serve a useful purpose, that they "were getting along very good." (A. 503) The present verdicts were returned six hours later at approximately 6:00 p.m. (A. 504, 527)

REASONS FOR GRANTING THE WRIT

1. Coercion of jury's verdict denied Petitioners a fair trial by jury.

Incorporation of the Sixth Amendment right to trial by jury into those rights guaranteed defendants in state prosecutions by the Fourteenth Amendment (*Duncan* v. *Louisiana,* 391 U.S. 145 (1968); *Bloom* v. *Illinois,* 391 U. S. 194 (1968)) carries with it the further requirement that juries, and more particularly jury deliberations, be conducted in compliance with certain minimum standards of fairness. Cf. *Turner* v. *Louisiana,* 379 U.S. 466, 471-2 (1965). This Court has established minimum standards of fairness for the conduct of jury deliberations in the federal courts. In *Burton* v. *United States,* 196 U.S. 283 (1904), and again in *Brasfield* v. *United States,* 272 U. S. 448 (1926), the Court held that it was inherently coercive for a trial judge to inquire of a jury as to the extent of its numerical division during deliberations. See also, *United States* v. *Samuel Dunkel & Co.,* 2nd Cir. 1949, 173 F. 2d 506.

The Court of Appeals for the District of Columbia has intimated from these decisions that it is equally coercive for the trial judge to return the jury for further deliberations after receiving unsolicited advice as to the numerical division of the jury. Cf. *Mullin* v. *United States,* D.C.Cir. 1966, 356 F. 2d 368; *Williams* v. *United States,* D.C.Cir. 1964, 338 F. 2d 530; *Williams and Coleman* v. *United States,* D.C.Cir. 1968, ... F.2d ....., 4 Crl 3059. Other state decisions have concluded that unsolicited advice is equally as harmful as solicited advice, if that advice contains information concerning how many of the jurors stand on each side on the issue of guilt. See, *e.g., People* v. *Carter,* 60 Cal.Reptr. 297, 301 (1968). Indeed, the Illinois

Supreme Court has on one occasion suggested this distinction. See, *People* v. *Duskewycz*, 27 Ill.2d 257 (1963). The significant factor, as pointed out by the California Court, is that, once the standing of the jury has been made known to the trial judge, the jury members know he knows how the jury is inclined, and any action on his part indicating approbation of that standing is most likely to have a coercive effect on the minority members of the jury. See *People* v. *Carter*, 60 Cal.Reptr. 397, 301-2; *People* v. *Baumgartner*, 166 Cal.App.2d 103 (1958). This was implicit in *Mullin* v. *United States*, D.C.Cir. 1966, 356 F.2d 698, where the court approved of the trial judge's declaring a mistrial after receiving unsolicited advice, as "It would have been a precarious undertaking for the judge to give a supplemental charge to consider each other's views when he was already advised that only 4 of 12 jurors voted for acquittal." These cases considered the propriety of giving a version of the so-called "Allen Charge"[4] after the disclosure had been made, but coercion may result from conduct as well as from words.

Returning a jury for further deliberation upon being told that the jury is "completely deadlocked" eleven to one for conviction after approximately eight hours deliberation is as coercive as urging unanimity among the jury. Maintaining the deliberations for seven more hours signifies implicit agreement with the majority, who, undoubtedly, are encouraged to use this tacit approval of their stand to overcome the will of the minority. This is the type of jury-room atmosphere which *Brasfield* and *Burton* sought to avoid, for it is certain that the Court was not concerned with the trial judge's knowing how the deliberations of the jury had progressed, but rather with the

[4] *Allen* v. *United States*, 164 U.S. 492, 501-2 (1896).

effect which his knowledge would have on the jury once it returned to the jury room. As this Court has noted in another context, jurors are ever alert to the least suggestion from the trial judge as to his opinion on the merits of a case (*Quercia* v. *United States*, 289 U.S. 466, 470 (1933)), and any suggestion, whether by word or by action, that the judge holds a particular view would be treated with deference by those holding an opposite view and used with telling effect by those holding the same view.

The possibility of this occurring is so great that the Court laid down a flat proscription in *Brasfield* against any inquiry being made, leaving no room for speculation as to what did happen in the jury room. Here, the Illinois Court rejected Petitioners' claim and engaged in speculation as to what had happened in the jury room. (See App. A, *infra*, pp. 14-15) While we believe the reasons assigned by that Court are erroneous—for the actual issues involved in trial were not overly complicated and the task confronting the jury in sorting verdicts was not burdensome[5]—they are, nevertheless, precisely what *Burton* and *Brasfield* must be viewed as being designed to avoid—speculation as to what took place in the jury room.

Now that the Sixth Amendment right to jury trial has become effective in state as well as federal prosecutions, and in view of the longer standing requirements of fair

[5] 36 verdict forms were submitted to the jury. 18 related to guilty verdicts and 18 were "mirror" not guilty forms. Of these two sets of 18, 14 related to the events of May 7th only (2 kidnapping counts involving all 4 Petitioners, and 2 battery counts involving 3 Petitioners). Moreover, under the prosecution's theory of the case, Jack and George Chiagouris had been treated in exactly the same fashion, so that there was no complexity in resolving the kidnapping and the battery counts as to each alike. The number of verdict forms, therefore, presented a mechanical rather than a functional problem, if any.

trial by jury implicit in the due process clause of the Fourteenth Amendment (*Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961); *Turner* v. *Louisiana*, 379 U.S. 466, 471-2 (1965)), the Court should grant its writ of certiorari to determine whether the standard established for federal jury trials is of constitutional dimension.

2. Refusal to grant some Petitioners' motions for a severance denied these Petitioners their constitutional rights of confrontation, cross examination and fair trial.

The response which the Illinois Court made to Petitioners' claim that they had been denied their constitutional rights of confrontation, cross examination and fair trial by the introduction, during their joint trial, of Lombardi's August 7th statement to Walker illustrates a series of ever-occurring problems which arise as a result of this Court's decision in *Bruton* v. *United States*, 391 U.S. 123 (1968).

The Illinois Court suggested that the redaction of Lombardi's statement permitted its use. (App. A, *infra*, pp. 17-8) However the circumstances under which the statement was brought to the attention of the jury must have caused them to yield to the "nigh irresistible temptation to fill in the blanks" (Friendly, J., in *United States* v. *Bozza*, 2d Cir. 1966, 365 F.2d 206, 215) left by the omission of the co-defendants' names. Walker began his testimony on this matter by relating that Lombardi stated, in response to a question by him as to whether there were not a way to pay off loans, that the question of paying off the loans "wasn't his responsibility." The prosecutor suggested that the other co-defendants were involved by asking the witness: "* * * Without naming whose responsibility—was there further conversation?" The witness replied that Lombardi had said "that he wasn't responsible for setting

a figure." He also testified that, later on, he asked Lombardi if he had been "involved in" and "participated in" the May 7th beating of Jack and George Chiagouris, which was the direct subject of the aggravated battery counts and the forerunner of the kidnapping charges. Finally, in talking about these beatings, the witness said that Lombardi had told him "they" had ways of collecting on loans from which "they" did not deviate. The repeated use of plural forms incriminated the co-defendants just as surely as if their names had been employed. *United States ex rel. La Belle* v. *Mancusi*, 2nd Cir. 1968, 404 F.2d 690.

Bruton suggested, and most courts have followed the principle, that, to be effective, not only the direct and indirect identification of co-defendants, but, any statements which could be damaging to them once their identity is otherwise established must be eliminated. See, e.g., *State* v. *Young*, 46 N.J. 152, 215 A.2d 352 (1965); *People* v. *Cambell*, 299 N.Y.S.2d 280 (1969); *United States ex rel. LaBelle* v. *Mancusi*, 2nd Cir. 1968, 404 F.2d 690. Yet in this case, while the direct identification of those who "participated" and were "involved" in the alleged beatings, and who set the policies for collection and repayment of loans, was deleted, the prosecution was able to present the statement in such a fashion as to leave no doubt that Lombardi had incriminated the other defendants.

But the Illinois Court first ruled that *Bruton* was inapplicable because Lombardi had taken the stand in his own defense and had been available for cross examination. (App. A, *infra*, p. 17) This answer, we submit, ignores the spirit of and the fundamental constitutional considerations underlying *Bruton*. The Constitution, and necessarily *Bruton*, assume a meaningful and effective confrontation and cross examination of the "witness"

who made the accusation contained in the out-of-court statement. Thus, it is no answer to say that Lombardi was available for cross examination. When cross examined by the prosecution, he denied making the statement later attributed to him by Walker. At this juncture, further cross examination by his co-defendants on this subject would have been futile and meaningless. Later, on rebuttal, the prosecution first introduced evidence of the statement by Lombardi which incriminated his co-defendants. Under these circumstances, the witness who incriminated them—that is, the Lombardi who made the statement to Walker—did not accuse them in court and, in essence, the Petitioners had no opportunity to confront or cross-examine that witness.

This is the view taken by the California Supreme Court. Noting that "Some courts have taken the position that * * * *Bruton* is not intended to apply to the situation when the extrajudicially confessing co-defendant takes the stand and is subject to cross-examination (*Rios-Rameriz* v. *United States* (9th Cir. 1968), 403 F.2d 1016, 1017; *Santoro* v. *United States* (9th Cir. 1968), 402 F.2d 920, 922; *Lipscomb* v. *Maryland* (1968), 5 Md.App. 500, 506, 248 A.2d 491, 494)," the California Court adopted an opposite view in *In re Hill*, 80 Cal.Reptr. 537, 458 P.2d 449 (1969). Relying on the declaration in *Pointer* v. *Texas*, 380 U.S. 400, 407 (1965), that a defendant must be given an "adequate opportunity" to cross examine the witnesses against him, on the holding of *Barber* v. *Page*, 390 U.S. 719 (1968), that the right to confrontation is basically a trial right, and on their own holding in *People* v. *Johnson*, 68 Cal.2d 646, 441 P.2d 111, *cert. den.* 393 U.S. 1051 (1969), that pre-trial statements by a recanting prosecution witness can not constitutionally be considered by the jury as substantive evidence, the Court held that "the Sixth Amendment right to

confrontation is intended to give to defendants in criminal cases the right to cross-examine as to statements made by the witness *at the time the witness makes those statements, before the same trier of fact which sits on the issue of his guilt* * * * *" *In re Hill,* 80 Cal.Reptr. 537, 547 (emphasis in original). The diversity of opinion which exists on this crucial issue since *Bruton* (noted in *Hill* and further represented by the decision of the Illinois Court here) warrants resolution by this Court. In a sense, *Bruton* only scratched the surface, for the question of whether or not to admit an extrajudicial statement by a testifying co-defendant is one which occurs with as much frequency as the original question considered in *Bruton.*

The Illinois Court also suggested that the statement here was admissible because the prosecution had a natural right to impeach Lombardi and show that his testimony was false. (App. A, *infra,* p. 17) This resolution of the problem ignores the rights of the co-defendants in the matter. They did not, as the trial judge explicitly noted,[6] call Lombardi as their witness. They were powerless to prohibit his taking the stand, or to control the content of his testimony. As a consequence, however, they were incriminated and prejudiced because he did testify and because the prosecution was permitted to impeach him by an incriminatory statement. Naturally, if the instruction not to consider the statement as evidence against persons not making it is ineffective, the instruction to consider the statement as impeaching evidence only must similarly be regarded as ineffective.

Certiorari should be granted to settle these important procedural problems which arise as an aftermath of *Bruton.*

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[6] "The Court: But this is not their witness." (R. 2869)

CONCLUSION

For the above and foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE APPELLATE COURT.

Mr. Justice McCormick delivered the Opinion of the Court.

The defendants, George Bravos, Joseph Lombardi, Sam Mercurio and William Messino, were tried jointly before a jury. A five-count indictment had been returned, Count I of which charged that the four co-defendants [and two others subsequently acquitted] conspired in agreeing to intimidate Jack, George and Albert Chiagouris by threatening to inflict unlawful physical harm with the intent to cause them to pay money to George Bravos, Joseph Lombardi, William Messino and Sander Caravello.

Count II charged that the defendants and one Alice Erwin [subsequently acquitted] committed the offense of aggravated kidnapping on May 7, 1965, by confining Jack Chiagouris against his will for the purpose of obtaining a thing of value.

Count III charged the same five defendants [again Alice Erwin was acquitted] with the same offense as alleged in Count II, except for the charge that George Chiagouris was the person kidnapped.

Counts IV and V charged that Bravos, Lombardi and Messino committed the offense of aggravated battery on George Chiagouris [Count IV] and on Jack Chiagouris [Count V].

Judgments of acquittal were ordered as to defendants Erwin and Caravello, but guilty verdicts were returned as to the other four, finding Bravos, Lombardi and Messino

guilty on all counts, and Mercurio guilty only on Count I [conspiracy]. The court imposed the following sentences: Bravos, 5 to 20 years in the Illinois State Penitentiary on each of the kidnapping counts, 1 to 10 years on each of the battery counts; 6 months in the County Jail on the conspiracy count; Lombardi, 7 to 20 years on each of the kidnapping counts, 1 to 10 years for the battery on George Chiagouris and 5 to 10 years for the battery on Jack Chiagouris, 6 months in the County Jail for conspiracy; Messino, 10 to 30 years on each of the kidnapping counts, 1 to 10 years for the battery on George and 5 to 10 years for the battery on Jack Chiagouris, 6 months in the County Jail for conspiracy; Mercurio, 5 years probation, conditioned upon incarceration for 30 days in the County Jail for conspiracy.

On appeal the defendants raise the following points:

1) The defendants were denied a fair trial by the jury because the jury's verdict was coerced.

2) The defendants were denied a fair trial and were denied their rights of confrontation and cross-examination because the trial court refused to grant their motions for severances. These motions include all defendants except Lombardi.

3) The trial court permitted self-serving exhibits to be introduced into evidence, which constituted error.

4) The trial court admitted into evidence material regarding transactions between the brothers and Caravello which was not relevant to the issues at trial.

5) The trial court admitted into evidence material of an independent and irrelevant surveillance of defendants.

6) The court allowed the prosecutor to disclose to the jury in his opening statement that Messino had attempted to evade apprehension by police officers and that such contention could not be proved.

7) Certain remarks made by the prosecutor prejudiced defendants and deprived them of a fair trial.

On June 23, 1964, Albert, Jack and George Chiagouris, brothers and co-partners in a construction firm, negotiated a loan for $50,000 from defendant Messino. Arrangements for the loan were completed in the office of Sander Caravello, at which time there were present Caravello, Messino, Bravos, and the Chiagouris brothers. Messino set the interest rate at 40 per cent and made a requirement that the $70,000 was to be repaid in 47 weekly installments of $1,500 each for 46 weeks and $1,000 the last week. When Albert Chiagouris asked what kind of collateral would be required, Bravos said, "The only security we want is your eyeballs."

Two days later the brothers returned to Caravello's office to receive the $50,000 and to execute judgment notes for the installment notes. Lombardi was present and the brothers were informed that he would receive the weekly payments in case Messino was not available when they were made.

Caravello had vouched for the brothers and he received a week's loan of $15,000 of the $50,000 from the Chiagourises, which arrangement was unknown to Messino. On July 28, 1964, the three brothers again met with Messino, Bravos and Caravello to borrow an additional $100,000, with the agreement that the amount, plus $30,000 interest was to be repaid within 105 days. After this transaction was completed on July 31, Messino left, and Caravello was given

$25,000 of the proceeds as another loan. He signed a note for that amount and agreed to pay it back to the Chiagouris brothers plus a pro rata share of the interest the brothers would have to pay on their loan.

Defendants' counsel point out that the brothers' partnership statement dated November 1964, purporting to enumerate their assets and liabilities of that date, showed figures which did not reflect the alleged loans. They had missed making the $1,500 payment due on October 9, 1964, and on October 10, Jack and George Chiagouris met Messino in the Bee Gee Builders parking lot. Both brothers testified that Messino jumped from his car screaming obscenities at them and struck Jack in the face. George explained that they had the $1,500 and Messino told them it would cost them an additional $1,000 for each day payments were late.

In November 1964, the brothers met with defendant Sam Mercurio and explained that they were finding repayments difficult because of the $40,000 they had loaned Caravello. Mercurio promised to try to help them obtain refinancing. The brothers' attorney testified to this meeting, although neither Jack nor Albert could recall whether he was present at the time.

On November 13, 1964, the expiration date of the 105 days in which the loan of $100,000 with interest was to be paid, the three brothers met Messino in a cocktail lounge. Lombardi and Bravos were also present, and when Albert informed them that they did not have the required payment, Messino told Bravos that the brothers had given Caravello $40,000 of the $150,000 loan. He then asked Bravos' permission "to take these fellows out and put a bullet in their head." After it was announced that a

further penalty would be exacted for failure to meet payment deadlines, Caravello was brought to the table. He admitted receiving the $40,000, at which point Messino hit him in the face, kneed him, knocked off his glasses and scratched his forehead. Messino then said, "We're going to have something to eat and after we eat we're going to go for a ride, and the treatment you just got now you're going to get every five minutes along the way."

The brothers later learned that Caravello had been given a "pass." They continued to make their payments through January of 1965, but on February 20, they met Lombardi at the Oriental Gardens Restaurant and told him they did not have the money for the installment due; that a loan had been arranged with a bank. Lombardi called Messino in Florida and when Messino spoke with George he asked if he wanted him to "fly out to Chicago to get this thing straightened out."

The brothers continued the payments with difficulty, and in March 1965, when two of them went to the Bonfire Restaurant to keep an appointment with Messino they were met in the parking lot by Bravos and Messino. When they said they could not yet pay the $100,000, Bravos said, "I am going to choke you until your tongue hangs out because you guys are fooling around," and Messino shook his fist at Jack Chiagouris while demanding the money.

After the notes for the first loan and its interest had been fulfilled Messino returned them to the brothers. Although partially destroyed, fragments of the notes were admitted into evidence, as well as a piece of paper on which Messino had refigured the $100,000 loan in April. From that point on it was the loan of $100,000 which served as the source of trouble.

On May 7, 1965, the brothers were to meet Bravos, Messino and Lombardi at the Wow Restaurant [Bonfire], and one of the brothers called Messino at about 7:30 p.m., to tell him that the meeting would be futile since they did not have the money for the payment. Messino said, "Either you tell me where you're at, and if I have to come out and get you, you'll get hurt. If you meet me the way you're supposed to meet me over here, everything will be all right." George and Jack went to the restaurant at about 10:30 p.m., and met Messino in a picnic area near the building. He asked where their brother Albert was and when they said he was out of town Messino grabbed them both by their ties and lifted them. He struck Jack in the face with his fist, then he struck George, kicked him, and kicked Jack on his side, then kicked George again, all the time demanding in profane language to know where Albert could be found. Lombardi knocked George's hands down and also struck Jack in the face at Messino's direction.

George was then taken to a telephone booth to call Albert and he told Lombardi that his brother was in Boston; he tried to whisper this same statement to Jack, but was prevented, and Jack told them that Albert was in some other city. At this point Messino struck Jack in the face, and Jack was taken to a telephone to call his brother, but fainted before he could so do. He was then dragged back to the restaurant when he and George were told they would not be let loose until they came up with something to secure the loan. George told them they had a trust valued at $140,000 which they would pledge as security, although there were two prior assignments on the beneficial interest. Bravos told them they wanted the assignment and that it should be made to defendant Mercurio. Mercurio

arrived at the picnic area sometime around midnight and Bravos told him the beneficial interest in the Chiagouris brothers' trust was to be assigned over to him. Both brothers said that at the time of this meeting they were visibly beaten. Mercurio left after telling them he would try to contact Albert to make arrangements for the assignment the next day.

Concerning the events at the restaurant picnic area, the defendants, Lombardi and Mercurio, admitted their presence there as well as that of defendants Bravos and Messino; they testified, however, that it was a chance meeting, and Lombardi had not come with Messino, but with an old friend, and that Mercurio had only stopped in to get something to eat. Both Mercurio and Lombardi said they had gone to the Chiagouris table and that Jack and George were not beaten.

Albert Chiagouris testified that he contacted Mercurio around midnight on that date, trying to locate his brothers, and that he was told Mercurio had just left them with Bravos and the "little guy" [Messino]). Albert was told that his brothers had been "slapped around a little bit" and when he asked how bad it was, Mercurio said, "They got slapped around." Mercurio then told Albert of the proposed assignment, explaining that Bravos and Messino wanted security for the loan. Albert was told he could not reach his brothers and he said, "Now, what they are doing now, they are holding my brothers for ransom," to which Mercurio replied, "Use your own deduction." Albert called Mercurio back in about 20 minutes to see if he had heard from his brothers; Mercurio said he hadn't and probably would not until later in the day, and that Albert should call him the next morning, even though Albert insisted he would not make any assignment without talking with his brothers.

That same evening George had asked Messino to let him go home, but Messino refused, and drove the two brothers, with Bravos and Lombardi, to a cocktail lounge where Alice Erwin joined them. Two calls were made to try to contact Albert; instead, George managed to reach a fourth brother, Richard, and told him to get in touch with Albert regarding the trust. Lombardi testified that he saw the brothers at the lounge but denied being a part of the group, while George said Lombardi gave him instructions during his conversation with Richard, telling him what to say and when to hang up. Lombardi soon left with Alice Erwin, and Bravos then left with Messino and the two brothers, driving to the Wow Restaurant parking lot, where the brothers again asked to go home. Messino refused their request, took their car keys and drove to Alice Erwin's apartment, where they stayed until about 4:00 a.m. They then drove around for half an hour and George asked to be allowed to go home, but Messino replied, "No, we'll go some place else." They went to Messino's home and were taken to the basement.

At about 10:30 a.m., on May 8, Messino told the brothers they could go on their own and that they should meet at Mercurio's office later in the morning. They drove to Mercurio's office and George said he felt "pretty lousy. Jack's got a broken jaw, he can't even open his mouth." According to George, Mercurio said, "They are a bunch of animals."

The meeting at the bank was set for 12:30. George testified that when they arrived at the bank they were all disheveled. He said, "I hadn't shaved, my clothes were wrinkled, my false tooth . . . was broken, my face was swollen, I couldn't breathe too well and I couldn't sit up

straight." George said that Jack was also unshaven, "his clothes were all wrinkled, he was bent over, he couldn't open his mouth and the whole left side of his face was swollen. He was just about white as a sheet."

The brothers and Mercurio met a Mr. Andringa in the trust department of the bank and Albert joined them. Albert's testimony substantiates the physical condition of George and Jack as testified to by them. Although Mr. Andringa did not recall that the brothers appeared beaten up, he also did not recall seeing Mercurio on that date. The beneficial interest in the trust was conveyed to Mercurio through an instrument bearing the signatures of the three brothers and Mercurio. Mercurio explained the assignment by saying it was intended to secure a $13,000 loan which he had arranged for the brothers with the River Forest Bank, by which circuitous method the brothers would divest themselves of title to the $130,000 trust so that their creditors would leave them alone, and Mercurio would hold that interest while the brothers worked out some arrangement to repay the $13,000.

New notes of debt were drawn up showing a balance due of $124,000, and a schedule of payments was agreed upon. After a series of repayments the brothers went to the Illinois Crime Commission on July 28, 1965, and agent Robert Walker was assigned to the case posing as George's brother-in-law. Subsequent payments were made with money given the brothers by the Illinois Crime Commission, and during one of the payments Walker had occasion to talk with Lombardi. At the trial, on cross-examination Lombardi denied that Walker had told him he was worried about George's getting his jaw broken as Jack had done. Lombardi further denied that Walker had asked

him why he had to be so rough on Jack, and denied saying that it was only a broken jaw and could have been worse. He denied having told Walker that he had his methods of collecting money and that Jack and George had been slapped around by him.

Prior to the previous cross-examination the State disclosed at trial that Lombardi had made an oral statement to an agent, and successfully moved to expunge an earlier order directing the State to furnish defense counsel with "copies of any written or oral statements in each cause." Counsel for Bravos, Messino and Mercurio moved for a mistrial, a severance from Lombardi, and for a severance of the conspiracy count from the substantive counts of the indictment. The motions were denied. The State then assured the court that Lombardi's confession would not be used. After objections to the foregoing cross-examination were overruled the defense counsel renewed their motions for severance of parties and counts, which motions were denied.

Walker was then permitted to testify in rebuttal regarding the conversation with Lombardi and was cautioned to mention no names Lombardi might have used. He testified that Lombardi had told him he had been involved in the beating of Jack and George, and that he had said "they had certain ways to collect and they didn't deviate from those methods." According to Walker, Lombardi had also said, "Well, it was only a broken jaw, it could have been a lot worse." At the conclusion of Walker's testimony the court admonished the jury that the evidence was to be considered "for the limited purpose of having you decide whether or not Joseph Lombardi has made out of court statements inconsistent with his testi-

mony." The jury was further instructed that Walker's testimony "should not be considered for the purpose of establishing the truth of the facts related in the alleged conversation," and that it was "offered for impeachment purposes only."

Robert Potter, of the U. S. Treasury Department, testified that on June 11, 1965, Messino and Mercurio met at the Wow Restaurant with Caravello. After his testimony the jury was instructed to draw no inference "whatsoever that these defendants were the subject of any inquiry or investigation by this witness, his business having been some sort of law enforcement officer."

Counsel for Messino alleges that he moved the court limit the prosecutor's opening statement to exclude mention of the alleged flight by Messino at the time of his attempted arrest on August 17, 1965. This motion is not mentioned in the report of proceedings; however, four defense counsel submitted affidavits that such a motion had been made. Two assistant state's attorneys filed counter-affidavits in which they set out that no such motion had been made. The court said it could not recall whether or not such a motion had been made.

In his opening statement an assistant state's attorney told the jury that Messino had fled agents of the Illinois Crime Commission when they attempted to apprehend him. During the trial the court sustained an objection to and struck proffered testimony that Messino ran from agent Walker during an attempted arrest.

The case was given to the jury at about 6:00 p.m. on Friday, January 20, 1967; their deliberations ceased at 2:00 a.m. on Saturday and did not resume until 10:00 a.m. One hour later the foreman advised the court that the

jury was "completely deadlocked, eleven to one. We are no further than we were last night at midnight, no further along, and there's nothing we can do about it. The party just don't believe the case was proven. We sat and talked, and that's it." The court then instructed the jury to retire. At that point counsel for defendants moved for a mistrial on the ground that further deliberations would prove coercive on the juror who felt the case had not been proved. The motion was denied. Six hours later the verdicts were returned.

At the beginning of this opinion it is necessary to note that the trial of the case took place over a period of approximately nine weeks. It should be further noted that there were four defendants and thirty-six verdict forms given to the jury. The record filed in this court has 3916 pages and the abstract has 534.

In their brief the defendants make no point that they were not found guilty beyond a reasonable doubt. In the brief filed by the State the following appears:

> "The defendants make no claim that they were not proved guilty beyond all reasonable doubt of these crimes. The overwhelming nature of the evidence against the defendants much of which is uncontradicted, coupled with the tales of incredible coincidences told by defendants Lombardi and Mercurio to cast an innocent light upon their conduct, leaves the defendants no choice but to concede guilt and to pray for a new trial based on purported errors in the lengthy proceedings below."

In their reply brief the defendants made the following statement:

> "To imply, however, that the defendants *concede* guilt is beyond impropriety. If defendants do not

> question the sufficiency of the evidence, it is only out of respect for the Supreme Court's repeated admonitions to the Bar that the Court does not sit to weigh the credibility of witnesses or to determine where the truth lies in any given set of facts. See e.g., *People* v. *Woods*, 26 Ill. 2d 582. That there was a credibility question presented to the jury in this case cannot be denied. But, if defendants concede anything, it is only that this question begins and ends with the jury, and that this Court will not—nor should it—sit in judgment on the jury's choice of alternatives. See *People* v. *Horodecki*, 15 Ill. 2d 130."

In *People* v. *Horodecki*, 15 Ill. 2d 130, the court lays down the rule so often stated in Illinois courts that it hardly requires any citation of authority. At page 135 the court said:

> "It was for the jury to weigh the testimony and determine the credibility of the several witnesses. [Citing cases.] There was ample evidence from which the jury could conclude that the defendant was one of the participants in the robbery."

In the instant case it is apparent from the record that the evidence introduced, if believed by the trier of fact, was sufficient to convict the defendants beyond reasonable doubt; consequently, the only questions to be presented to this court are those raised by the defendants with reference to the conduct of the trial.

1. The first question is whether the court properly ordered the jury to retire after their statement to the court concerning their difficulty in arriving at a verdict. Defendants' theory is that by sending the jury back to deliberate, under the circumstances, the court in effect gave an unspoken instruction to the jury to find the defendants guilty. Defendants rely upon *Brasfield* v. *United*

States, 272 U. S. 448, in which case the court held that reversible error was committed when a trial judge inquired as to the numerical division of a jury which was unable to agree, and the Supreme Court concluded that the "general tendency" of such practice was "coercive."

In the instant case we must again point out that the trial before us on review lasted almost nine weeks; that there are four defendants, each represented by different counsel; and that thirty-six verdict forms had been submitted for the jury's consideration. In oral argument in this court the defense counsel asserted that the issues at trial were relatively simple. Even if that could be assumed to be true, there was a vast amount of material presented to the jury, and a conscientious attempt to weigh the evidence would justify extensive deliberation. The jury was given the case at 6:00 p.m. on January 20, and the complained-of order of the trial court came after the jury had deliberated approximately eight hours.

The jury was called into court three times on the evening of January 20, retired for sleep at 2:00 a.m., resumed deliberations at 10:00 a.m. on January 21, and the foreman made his comments to the court at 11:00 a.m. that same date. The jury continued its deliberations for five and one half hours, allowing a reasonable time for lunch, before reaching a verdict. That a decision was not immediately forthcoming after deliberations were resumed tends to detract substantially from the argument that the decision was coerced by the trial judge. Defendants are not entitled to relief simply because a juror is ultimately persuaded to join in the decision. Furthermore, the jury did not return verdicts against all the defendants on all the counts. Defendant Mercurio was found guilty only on

Count I. Again, this does not indicate that the jury had been coerced by the trial judge into blanket findings. Rather, it suggests a jury which carefully considered the evidence and reached its decisions on the basis of its own determination.

Whether or not a jury should be discharged is a matter which rests in the sound discretion of the trial court, and its judgment in this regard will not be disturbed unless this discretion is shown to have been clearly abused. *People* v. *Daily,* 41 Ill. 2d 116; *People* v. *Mays,* 23 Ill.2d 520. In *Daily,* after six and one half hours of deliberation the foreman advised the court that the jurors had not reached an agreement and the judge recommitted them to further deliberations. Shortly thereafter the jury returned a guilty verdict. In holding that the jury verdict was not coerced by the trial court the Supreme Court noted that the presentation of the case had taken four days, with thirty-one witnesses presenting conflicting evidence, and that it "cannot be realistically argued that the trial court coerced the jury into returning a verdict."

The present case lasted nearly nine weeks and included the testimony of 23 witnesses, with more than 20 exhibits. On the basis of this record we cannot say that the trial court abused its discretion by allowing the jury to continue deliberations after they had met for approximately eight hours. *Brasfield* v. *United States, supra,* does not indicate that a different result would be proper. There the trial court asked the jury to tell its numerical split, and when informed of the division the court instructed the jury to continue deliberations. The Supreme Court held that "the inquiry itself" necessitated a reversal of the conviction.

The practice of trial judges questioning juries with reference to their numerical division has been earlier condemned in *Burton* v. *United States*, 196 U. S. 283. However, these cases condemn the active intrusion of the trial court into the jury's deliberation process. The case before us involves no such intrusion since the information given to the court was unsolicited and the court was exercising its sound discretion.

2. The defendants argue that they were denied the right of confrontation and cross-examination by reason of the trial court's refusal to allow their motions for severances of persons and counts. They state that Lombardi's testimony tended to incriminate the other defendants. On August 7, 1965, Lombardi made certain self-incriminating statements to agent Walker which statements also incriminated the other defendants by inference. Lombardi told Walker that he had been involved in the beatings and that "others" had the responsibility for determining the manner in which the loans were to be paid off; that "they" had ways of collecting. Defendants argue that Lombardi's statements amounted to an accusation of his co-defendants of the crimes for which they were being tried.

The defendants further argue that, assuming there had been a severance, Lombardi's statements, unless construed as an act in furtherance of conspiracy, would have been inadmissible as evidence of the substantive counts; therefore, the defendants contend that the introduction of the evidence prejudiced them.

On trial, under direct examination, Lombardi denied that he or the other defendants had beaten the Chiagouris brothers—testimony inconsistent with his purported statements to agent Walker. On cross-examination he denied

making certain damaging admissions. Walker was then called to impeach Lombardi's testimony, after which the jury was instructed that the testimony regarding statements Lombardi had made to Walker was admitted for the limited purpose of impeachment, and that Walker's testimony should not be considered for the purpose of establishing the truth of the facts related in the alleged conversation. Defendants argue that an instruction could not repair the damage caused by allowing the evidence to be introduced, and that the defendants were deprived of a fair trial and "of the constitutional right to confront and cross examine that accusation."

Here we must point out that one does not confront or cross-examine an accusation; one confronts or cross-examines a witness. In *Bruton* v. *United States*, 391 U. S. 123, it was held that the defendant was denied his right of confrontation and cross-examination when a co-defendant's out-of-court statement which inculpated the defendant was read into evidence, but the co-defendant himself did not testify. However, in the case before us Lombardi did testify and in fact attempted to exculpate both himself and his co-defendants by stating that neither he nor anyone else beat the Chiagouris brothers on the night in question.

The relation of out-of-court statements made by Lombardi to Walker, which were inconsistent with his testimony at trial, was used to impeach Lombardi, and from the State's viewpoint, to prevent the giving of unchallenged and perjured testimony to the jury. Furthermore, Walker, in using Lombardi's alleged statement, deleted any names Lombardi had mentioned. Where names of co-defendants are omitted from the body of a confession the co-defendants are still prejudiced if it is apparent

from the context that it was the names of the co-defendants which were deleted. *People* v. *Hodson,* 406 Ill. 328; *People* v. *Gregory,* 22 Ill. 2d 601. Defendants argue that it was an inescapable conclusion that the names deleted by Walker from Lombardi's statement were those of the co-defendants.

This argument, however, must fall, since the complained-of testimony was not introduced as a part of the State's case-in-chief, but was brought in only as rebuttal testimony. Lombardi testified; consequently, he was subject to cross-examination. The jury had been carefully instructed regarding the purpose for which they were and were not to consider Walker's testimony. We do not feel that the use by Lombardi of the word "they" necessarily pointed to the co-defendants. In any case, prior evidence had so firmly linked the defendants together that no further proof was necessary to establish the conspiratorial bond between them.

3. The defendants argue that the State was permitted to introduce into evidence self-serving exhibits, which admission was reversible error. The exhibits referred to were various writings and one check, intended to establish the fact that loans actually were made. People's Exhibits 1 and 3 were carbon copies of notes allegedly executed by the brothers and delivered to defendant Messino for the first and second loans. People's Exhibit 14 was fragments of original notes executed for the first loan, allegedly returned by Messino to the brothers; and People's Exhibit 5 was a $10,000 cashier's check purportedly refused by Lombardi, which check was later cashed and the proceeds turned over to Lombardi.

No objection was made to the testimony of the brothers regarding the making or repayment of the loans. Such evidence was relevant in establishing a foundation for believing that violence resulted when the payments became tardy. The only objection made on appeal is that self-serving documents were introduced, together with the testimony in support of the fact that the loans were actually made, and that the documents should not have been admitted.

This is not a serious issue. The damaging evidence was the testimony of the brothers regarding the making of the loans and the repayment procedures. The exhibits were merely secondary sources, and the fact that the defendants assert there was no connection between the documents and the alleged transaction does not require the exclusion of the documents. They represented physical evidence connected to the defendants through the testimony of State witnesses, and as such were admissible. The jury had the burden of assessing the proper weight to be given the documents.

4. The defendants contend that error was committed when the trial court permitted the introduction of evidence of transactions between the brothers and defendant Caravello, who was acquitted by a directed verdict at the close of all the evidence. It is asserted that evidence of the said transactions was irrelevant to the issues on trial, and that evidence concerning the beating of Caravello was prejudicial to the defendants. However, the trial court instructed the jury not to consider the evidence of these transactions as against anyone but Caravello. In giving such instruction the court exercised extreme caution, and the admitting of the evidence was unquestionably proper.

The fact that the brothers were able to give Caravello large sums of money immediately after the meetings with the other defendants implies that they had just obtained large sums of money through the loans from the defendants. Evidence concerning the beating of Caravello when the defendants learned that the brothers were slow in payments to them on account of loans they had made to Caravello, substantiates the intimidation charge on the part of the brothers, since the beating occurred in their presence and could have been intended as a lesson to them that they should make their payments on time. As we have said, the trial court instructed the jury to consider the evidence only against Caravello. Under the circumstances, the limiting instructions adequately protected the defendants.

5. The defendants assert that evidence was permitted to be introduced showing an independent surveillance of some of the defendants which took place on a date which was irrelevant to the instant case and that the permitting of such evidence was error. Robert Potter, criminal investigator for the Secretary of the Treasury, testified he had seen Messino, Mercurio and Caravello meet at the Wow Restaurant on July 11, 1965. The date is not important with reference to the charges against the defendants. The defendants argue that the testimony was prejudicially suggestive that they were guilty of other misconduct, and that such testimony must have affected the jury in spite of the fact that the trial court instructed them to draw no inferences that the defendants were the subject of an inquiry by some other law enforcement agency. The alleged beating of the brothers had occurred in the Wow Restaurant during the previous month, and Potter's testimony was circumstantial evidence tending to

show an association between some of the defendants who were meeting at the same place. Although the evidence may not have been absolutely necessary to prove the case, that fact does not make its admission so prejudicial as to require reversal. Great latitude should be granted to the trial court in assessing the admissibility of circumstantial evidence when such evidence was offered to establish factors pointing towards a conspiracy. In this instance the court did not abuse its discretion by allowing Potter to testify.

Defendants argue that the trial court should have restricted the prosecutor's opening statement by not allowing him to interject remarks regarding Messino's flight from the arresting authorities. There is a direct dispute as to whether or not defense counsel had ever made a pretrial motion to restrict the State's opening statement, and since the motion and the ruling do not appear in the record, the argument could be disregarded. *People* v. *Funches*, 17 Ill. 2d 529. The rule laid down in *Muscarello* v. *Peterson*, 20 Ill. 2d 548, does not apply. In that case the court held that if the alleged conduct is so prejudicial that the other party cannot receive a fair trial the court will review and consider assignments of error, even though no objection was made. That rule has no application to the situation in the instant case. However, assuming that defense counsel made such a motion in the instant case, there was still no reversible error. The jury was instructed to disregard the remarks it had heard concerning the chase. The evidence introduced was minimal and the instruction to disregard it came immediately after the testimony. Further, on the basis of the record, this one point is dwarfed by the other testimony regarding Messino's guilt. At most, it was a minor error which was quickly and adequately rectified.

Finally, defendants argue that they were denied a fair trial by improper comments of the prosecutor suggesting that the defense counsel were acting "tricky,' and employing unethical tactics in defense of their clients. We must consider that the trial was long and hard fought; and since no trial is a perfect one, in such cases counsel for both parties often say things which would be better left unsaid. Comments can be so far out of line as to deny defendants a fair trial; however, this did not occur in the instant case. True, caustic comments were made by both the State and defense counsel, but no comment was made upon inadmissible evidence or any other matter which would prejudice the defendants. See *People* v. *Gilmer,* ..... Ill. App. 2d ..... (No. 52134). Convictions are not reversed simply because either or both sides made a few comments which would have been better not made. In view of the clear and convincing evidence of guilt we cannot say that such remarks prejudicially influenced the jury or that the verdict would have been otherwise had the remarks not been made, and we will apply the rule laid down in *People* v. *Hines,* 30 Ill. 2d 152, 157, to that effect. In *People* v. *Naujokas,* 25 Ill. 2d 32, the court, referring to certain remarks made in the case, said at page 38:

> "While the remarks were improper, nevertheless, in view of the clear and convincing evidence of guilt of the crime charged, we are unable to say that the remarks may have influenced the result, or that the verdict could have been otherwise had the remarks not been made. *People* v. *Stephens,* 6 Ill. 2d 257."

In a very recent case handed down by the United States Supreme Court, *Harrington* v. *California,* 37 U.S.L.W. 4472, the court said:

> "We do not suggest that, if evidence bearing on all the ingredients of the crime is tendered, the use of cumulative evidence, though tainted, is harmless error. Our decision is based on the evidence in this record. The case against Harrington was not woven from circumstantial evidence. It is so overwhelming that unless we say that no violation of *Bruton* can constitute harmless error, we must leave this state conviction undisturbed."

In the instant case the evidence of the defendants' guilt, as in *Harrington,* was so overwhelming that any statements made by counsel are not of such character as to constitute reversible error. Defendants' arguments must fail, and the judgment of the Circuit Court is affirmed.

AFFIRMED.

LYONS, P.J. and BURKE, J., concur.

APPENDIX B

[September 9, 1969.]

PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

No. 52545 vs.

GEORGE BRAVOS, JOSEPH LOMBARDI, SAM MERCURIO AND WILLIAM MESSINO,

Appellants.

Appeal from the Circuit Court of Cook County

AFFIRMING ORDER

The judgment of the Circuit Court of Cook County is AFFIRMED.

APPENDIX C

[October 7, 1969.]

No. 52545

Petition of Appellants for Rehearing, DENIED.

APPENDIX D

UNITED STATES OF AMERICA

STATE OF ILLINOIS,
SUPREME COURT—SS.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the tenth day of November in the year of our Lord, one thousand nine hundred and sixty-nine, within and for the State of Illinois.

PRESENT: ROBERT C. UNDERWOOD, CHIEF JUSTICE
JUSTICE WALTER V. SCHAEFER
JUSTICE DANIEL P. WARD
JUSTICE CASWELL J. CREBS
JUSTICE THOMAS E. KLUCZYNSKI
JUSTICE JOHN T. CULBERTSON, JR.
JUSTICE MARVIN F. BURT
WILLIAM J. SCOTT, ATTORNEY GENERAL
ROBERT G. MILEY, MARSHAL
ATTEST: JUSTIN TAFT, CLERK

Be It Remembered, that, to-wit: on the 24th day of November 1969, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

PEOPLE STATE OF ILLINOIS,

Respondent,

No. 42616 vs.

GEORGE BRAVOS, JOSEPH LOMBARDI, SAM MERCURIO AND WILLIAM MESSINO,

Petitioners.

Petition for Leave to Appeal from Appellate Court

First District 52545

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

I, JUSTIN TAFT, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 17th day of December, 1969.

/s/ *Justin Taft*

Clerk,

Supreme Court of the State of Illinois

APPENDIX E

No. 42616

IN THE
SUPREME COURT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

GEORGE BRAVOS, JOSEPH LOMBARDI, SAM MERCURIO AND WILLIAM MESSINO,

Defendants-Appellants.

ORDER

This cause coming on to be heard on the Motion of the Defendants above named for a stay of mandate and for bail pending Petition for Certiorari in the Supreme Court of the United States, notice having been given Edward V. Hanrahan, State's Attorney of Cook County, and William Scott, Attorney General of the State of Illinois, and the Court having considered the motion of the defendants, and having heard the arguments of Counsel for said defendants in support of said motion and the arguments of the State's Attorney of Cook County, Counsel for the People in opposition to said motion, and being fully advised in the premises:

IT IS HEREBY ORDERED that the defendants' motion for a stay of mandate and for bail pending Petition for Certiorari in the Supreme Court of the United States be and the same is hereby granted, over the objection of the State's Attorney of Cook County, Counsel for the People and the defendants are hereby admitted to bail pending the filing and disposition of said Petition for Certiorari to

the Appellate Court of Illinois, First District, in cause No. 52545, conditioned upon the following:

1. That the defendants duly prosecute said Petition for Certiorari and file the same with the Clerk of the Supreme Court of the United States on or before the 31st day of December, 1969;

2. That the defendants, George Bravos, Joseph Lombardi, and William Messino, enter into recognizances with the Clerk of the Circuit Court of Cook County, Illinois, Criminal Division, in the amount of $50,000 each, to be secured by cash deposits of $5,000 each with the Clerk of the Circuit Court of Cook County, Illinois, Criminal Division, or his duly authorized agent, according to the Statutes of the State of Illinois made and provided;

3. That the defendant, Sam Mercurio, enter into a personal recognizance with the Clerk of the Circuit Court of Cook County, Illinois, Criminal Division, in the amount of $500.00.

4. That the defendants abide by all other conditions of bail bonds as set forth in Chapter 38, Section 110-10, Illinois Revised Statutes 1967.

DATED: Dec. 2, 1969.

ENTER:

/s/ *Walter V. Schaefer*
Justice of the Supreme
Court of Illinois

LIBRARY
SUPREME COURT, U. S.

Supreme Court of the United States

October Term, 1968

No. 1969

GEORGE BRAVOS, JOSEPH LOMBARDI,
SAM MERCURIO, and WILLIAM MERCURIO,

Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition For Writ of Certiorari to the
Appellate Court of Illinois, First District)

BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1019

GEORGE BRAVOS, JOSEPH LOMBARDI,
SAM MERCURIO, and WILLIAM MESSINO,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District)

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Appellate Court of Illinois, First Judicial District was entered on September 9, 1969 and is reported at 252 N.E. 2d 776.

JURISDICTION

The jurisdictional prerequisites are adequately set forth in the petition.

QUESTIONS PRESENTED

I.

Whether a jury may be returned for further deliberation after its foreman has spontaneously volunteered the present standing of the jury during its deliberations.

II.

Whether the right of a defendant to confront his accusers is denied when a co-defendant testifies and is impeached by the use of a prior inconsistent statement.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS' RIGHTS TO A FAIR JURY TRIAL WERE NOT DENIED BECAUSE THE TRIAL COURT'S INQUIRIES TO THE JURY DID NOT COERCE THE VERDICTS OF GUILTY.

It is the contention of petitioners that the conduct of the trial court in questioning the deadlocked jury and then returning them for further deliberations coerced the verdicts of guilty in violation of petitioners' rights under the Fourteenth Amendment (Pet. 15-18).

The position of the People of the State of Illinois is that: (1) the conduct of the trial judge was scrupulously fair and did not coerce guilty verdicts; (2) the authority cited by petitioners is neither instructive nor in point; (3) there is ample precedent—both federal and state—which precisely sustains what the trial court did here; (4) no case has ever held what was done here to be error, constitutional or otherwise.

A.

What Happened During The Jury's Deliberations.

Petitioners' account of the jury's deliberations (Pet. 14) is too sketchy to support full consideration of the question presented and makes necessary a restatement of the facts.

The trial began on December 15, 1966 after selection of the jury (A. 26). It concluded on January 21, 1967 with the return of verdicts (A. 30). This time span included 17 days of trial testimony heard by the jury (Pet. 13-14). In its case in chief, the state called 15 witnesses, who underwent a total of 45 instances of direct, cross, redirect and

re-cross examination (A. 102-346). Five witnesses were called by the petitioners and they underwent a total of 19 instances of direct, cross, re-direct and re-cross examination (A. 354-449). In rebuttal, the state called three witnesses who underwent 8 instances of such examination (A. 449-468). After closing arguments, the court gave 34 instructions to the jury (A. 483-93) and submitted 36 verdict forms—18 not guilty, 18 guilty—involving the four petitioners and eight charges of kidnapping, six charges of aggravated battery, and four charges of conspiracy (Pet. 4, 17).

The case went to the jury on Friday, January 20, 1967. After several hours of deliberation the jury returned to the courtroom at 10:25 P.M. The judge asked whether a foreman had been selected and the foreman responded (A. 496). The following then occurred:

> "The Court: Do you feel, sir, that you are on the verge of completing your deliberations?
>
> The Jury Foreman: No, your honor, far from it." (A. 496)

The court then denied the request of the foreman for a "private audience" and said "Is there something you wish to say about your deliberations?"

> "The Jury Foreman: We seem to be hung up on several points. We have one or two people who—
>
> The Court: *Perhaps you can stop there.* May I ask this question. Have you arrived at your verdict? Are there any verdicts upon which you have agreed?
>
> The Jury Foreman: No, sir.
>
> The Court: I don't know in which order you are taking things. I am, perhaps, just suggesting that whatever that order is, it might be done in the other order and see if there are some verdicts upon which you can agree.

The Jury Foreman: We have tried them all. Many different ways. We are getting mostly the same type of answer.

The Court: It has been a long trial and there is much to go . . . ." (A. 496-97) (Emphasis added).

The jury then retired, and after further deliberations, returned to the courtroom. They asked if they could continue to deliberate. The trial judge said they could. After denying a request for a dictionary, the judge said, "Not asked but implied in all of this, provisions for staying overnight have been made. But let's continue as long as you wish your deliberations and I will be here. That's all" (A. 497).

The jury returned to the courtroom shortly after midnight. The judge asked if any verdicts had been reached. The foreman said that they had agreed upon no verdicts, and requested another hour of deliberation. The jury then retired and returned again to the courtroom at 2:00 A.M. The judge said that he had no intention of directing them, and was not directing them, whether to continue further deliberations or to stop for the night, but asked "would some rest assist you?" The jury then agreed to stop for the night and resume deliberations at 10:00 A.M. (A. 498-99).

After deliberating from 10:00 A.M. to 11:00 A.M. Saturday, January 21, 1967, the jury returned to the courtroom:

"The Court: Good morning, Mr. Foreman?

The Foreman: Your Honor, we are no further. We are completely deadlocked, eleven and one. We are no further than we were last night at midnight, no further along, and there's nothing we can do about it. The party just don't believe the case was proven. We sat and talked and that's it.

The Court: You may retire to the jury room" (A. 500).

After the jury returned to it's room, counsel for petitioners moved for a mistrial. The motion was denied. The judge then called the jury back:

> "The Court: As the Court indicated, the case that you have under deliberation is a case of some length, and somewhat complicated. The Court is going to give you further opportunity to consider the matter. I note it is approximately ten minutes after eleven. Before too long it will be time for the midday meal. The Court is going to give you further opportunity to deliberate" (A. 502).

After an interval the jury returned to the courtroom and the judge asked, "Are you making any progress and will further deliberations serve any useful purpose?" The foreman replied, "Yes, very much so" and the jury retired again to deliberate. When they returned to the courtroom the judge asked, "Are you making any progress and would further deliberations serve any useful purpose?" The foreman replied, "Yes, sir, we are getting along very good" (A. 503).

After lunch, the jury again deliberated and returned its verdicts at about 6:00 P.M. (A. 527). They convicted petitioner Bravos of two charges of kidnapping, two charges of aggravated battery and one charge of conspiracy. Petitioners Lombardi and Messino were convicted of the same offenses. Petitioner Mercurio was convicted of conspiracy but acquitted of the kidnapping charges (Pet. 4).

B.

Petitioners' Statement Of The Law.

Relying upon two decisions of this Court, three decisions of the Court of Appeals for the District of Columbia, one

decision of the Second Circuit and two decisions from California and Illinois, petitioners synthesize an argument which runs as follows: (1) This Court has held that it is reversible error for a trial judge to *ask* a deadlocked jury about its numerical division; (2) the courts of appeal have applied the same rule to cases where the trial judge sends the jury back for further deliberations after receiving *unsolicited* advice from the jury concerning its numerical division; (3) both California and Illinois cases have found no distinction between solicited and unsolicited information.

The rationale of these decisions, say petitioners, compels a rule that where a jury reports to the court that it is deadlocked and spontaneously indicates its numerical division, the trial judge is powerless to follow any other course than to declare a mistrial, for to send the jury back for further deliberations is coercive and thus violative of the Sixth and Fourteenth Amendments.

There is no such rule. There never has been such a rule in either the federal or state courts. To the contrary, what the trial judge did here has been upheld time and again as proper.

In *Burton* v. *United States,* 196 U.S. 283 (1904), the first case upon which petitioners rely, this Court reversed a *federal* conviction for failure to repeat the defendant's instructions to the deadlocked jury as a supplemental charge when the Court had previously given them during the main charge, but had denigrated them, in the jury's presence, as "abstract" and "general" propositions of law.

After so holding, the Court said, in *obiter dictum,* that the trial judge should not have asked the jury for its numerical division and then given the *Allen* charge.[1] The

1. Allen v. United States, 164 U.S. 492 (1896).

Court observed that "Cases may easily be *imagined* where a practice of this kind *might* lead to *improper* influences, and for this reason it ought not to obtain." (Emphasis added.)

The case did not turn upon this point; no cases were cited for such a proposition; no other or further rationale was given; the Sixth and Fourteenth Amendments were not even mentioned. Mr. Justice Harlan dissented from both the holding and the *obiter dictum*.

Thereafter, some controversy arose among the circuits as to the meaning and effect of the *Burton dictum* and the Court next returned to the issue in *Brasfield* v. *United States*, 272 U.S. 448 (1926).

In *Brasfield*, the trial judge *inquired of the jury* concerning its division (which was 9-3), and then, after giving an admonitory charge as to the necessity of reaching a verdict, returned the jury to its deliberations.[2] Brasfield was convicted and this Court reversed, saying:

> "Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances *which cannot properly be known* to the trial judge or to the appellate courts *and may vary widely in different situations*, but *in general* its tendency is coercive. It can rarely be resorted to without bringing to bear *in some degree*, serious *although not measurable*, an improper influence upon the jury. . . ."[3]

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2. For an account of the facts concerning this issue, see Brasfield v. United States, 8 F. 2d 472 (9th Cir. 1925).

3. 272 U.S. at 450 (Emphasis added)

No cases other than *Burton* were discussed in *Brasfield;* the Sixth and Fourteenth Amendments were not mentioned.

In the case next relied upon by petitioners, *United States* v. *Samuel Dunkel & Co.*, 173 F. 2d 506 (2d Cir. 1949), the Court of Appeals read *Burton* and *Brasfield* as compelling the reversal of a federal conviction where the judge inquired of the jury whether it was evenly divided or whether there was a preponderance on one side, received an answer that there was a heavy majority for one verdict and returned the jury after giving the *Allen* charge.[4]

In *Williams* v. *United States*, 338 F. 2d 530 (D.C. Cir. 1964), the Court of Appeals, relying upon *Dunkel*, reversed a federal conviction where, after *inquiring* of the numerical divsion, the trial court gave an *erroneous Allen* charge and returned the jury to its deliberations. Judge Miller dissented.

In *Mullins* v. *United States*, 356 F. 2d 368 (D.C. Cir. 1966), the court affirmed a federal conviction on the ground that no double jeopardy resulted when the judge, in a previous trial of less than two days duration, declared a mistrial and discharged the jury after the jury had reported, in a note that it was unable to agree and stood seven for conviction, four for acquittal and one undecided. This holding was also supported by defense counsel's failure to object to the mistrial at the time.

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4. In so holding the Court of Appeals distinguished a case where the court received an unsolicited indication of the jury's division. Bowen v. United States, 153 F. 2d 747 (8th Cir. 1946), *cert. den.*, 328 U.S. 835 (1946).

After so holding, Judge, now Chief Justice Burger, in *dictum,* observed that the jury's unsolicited revelation of its exact numerical division might also have been grounds for a mistrial because it would have been a "precarious undertaking" for the trial judge to have given *an additional charge*[5] and returned the jury to deliberate again.

Williams v. United States, 403 F. 2d 176 (D.C. Cir. 1968), upon which petitioners rely, does not involve the issue at all. There the court decided the question of whether the manner of polling the jury was coercive. The court's language which merely recited the *Brasfield* rule, was *obiter dictum.*

Finally, we are at a loss to understand petitioners' reliance upon *People* v. *Carter,* 69 Cal. Rptr. 297,[6] 442 P. 2d 353 (1968). For in *Carter,* the Supreme Court of California declared that it was *proper* for the trial judge to inquire of the jury concerning their numerical division.[7] And *People v. Duskewycz,* 189 N.E. 2d 299 (Ill. 1963), is equally inapposite. The Supreme Court of Illinois did not, contrary to petitioners' assertion, find that there was no distinction between an inquiry and a spontaneous revelation of the nature of the division. The issue was neither involved nor discussed.

This, in essence, is petitioners' authority. In no case cited by petitioners was a federal conviction, let alone a state conviction, reversed, either for constitutional or nonconstitutional reasons, where a trial judge returned a jury

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5. Presumably, the Allen charge.

6. Erroneously cited in the Petition as 60 Cal. Reptr.

7. See 442 P. 2d at 356.

to deliberate after the foreman spontaneously revealed the nature of the jury's division. Moreover, we believe, for the reasons which we shall later discuss, that the *Brasfield* rule was not only poorly reasoned, but, as a matter of policy and the proper administration of criminal justice, is unsound as well. It has been widely, and well-nigh unanimously, criticized.[8]

C.

Court Inquiry Concerning A Deadlocked Jury's Division Serves A Valid Purpose In The Orderly Administration Of Criminal Justice.

In the preceding section, we have demonstrated that the only rule which this Court, and the lower courts, have laid down is that in the federal system a trial judge may not inquire of a jury how they stand numerically, when the jury reports that they are deadlocked and cannot reach a verdict.[9] But neither this Court, nor any other upon which petitioners rely, have ever said that the rule is of constitutional dimension, or that it applies to a case where the jury's division was spontaneously revealed without inquiry by the trial court. Moreover, in all of the cases that have been reversed on this point, the revelation of the nature of the jury's division was followed by an additional charge, either of the *Allen* variety or one that was, to some degree, coercive, and the rationale of the cases which prohibit in-

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8. VIII WIGMORE, EVIDENCE §2350, pp. 680, 681, n.3 (3d ed. 1940); VIII WIGMORE, EVIDENCE, §2350, p. 693, n.3 (McNaughten ed. 1961); ORFIELD, FROM TRIAL TO APPEAL, p. 467 (1947); *Note* 41 HARV. L. REV. 797 (1928); *Note*, 27 COL. L. REV. 756 (1927); *Note* 76 U. PA. L. REV. 622 (1928).

quiry therefore, has always turned upon the supposed special coercive effect of such a charge on the minority of jurors who know that the judge knows before he gives the charge, that only a minority is hanging the jury. The fault of this procedure, it is said, is that the minority jurors may then believe that the judge disagrees with their position since he has given them a "dynamite" charge and returned them for further deliberations.

We believe that even this reasoning of *Brasfield*, and the cases which follow it, is wrong.

First, it is natural and to be expected, that when the question of guilt or innocence is submitted to twelve jurors for decision, there will be, at least at the beginning of the deliberations, a contrariety of views. That, after all, is the fundamental purpose of the jury system—to impose upon the prosecutor the task of persuading twelve persons of the defendant's guilt. But no one would seriously suggest that the Sixth Amendment requires that a jury reach a unanimous result upon the first ballot, else a mistrial must be declared. Early jury division offers the opportunity for each juror to explain the reasons for the rightness of his conclusions, and, in turn, to receive the views of the other side so that he may weigh them against his earlier opinion.

It follows, therefore, that jury disagreement, even stubborn and seemingly unresolvable division, is to be expected on occasion, especially where, as here, the trial was protracted, numerous witnesses are heard, the issues complex,

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9. The same rule has been applied where the judge does not ask for the numerical division, but inquires whether the jury is evenly divided or whether there is a preponderance on one side. See, *e.g.*, United States v. Samuel Dunkel & Co., 173 F. 2d 506 (2d Cir. 1949).

or the case turns solely upon an assessment of credibility by the finders of fact. In such cases the jury will remain in deliberation without reaching a verdict, until past the time when the trial judge and counsel believe that the issue should have been resolved. At this point, the trial judge is confronted with alternative courses of action.

He may simply call in the jury and, without more, declare a mistrial for failure to agree, discharge the jury and set the matter over for a new trial.

Obviously, this precipitous procedure is not only inappropriate, but may in fact, in the circumstances of a particular case, be arbitrary and wasteful as well. Counsel and the court might be mistaken in their opinion of the appropriate length of time needed to decide the case. The jury might have been on the verge of a verdict when returned to the courtroom and discharged. The clarification or repetition of a particular instruction might resolve the division if the minority jurors (or the majority jurors, for that matter) are under a misapprehension concerning the law. Since the case will have to be retried, the expenditure of both legal and material resources in the first trial will be wasted, and the impact of such retrials upon already clogged criminal dockets will be severe.

It is apparent, therefore, that summary discharge of the jury and a declaration of mistrial is not only unwarranted, but unwanted as well. The task faced by the trial judge at this point is, then, to take some action with regard to the "deadlocked" jury which might fairly resolve the impasse.

The only viable alternative is for the trial judge to determine whether the jury division is of such magnitude that a verdict cannot be reached even if additional time

for deliberation is allowed. Obviously, this determination cannot be made without inquiry of the jury in some form.

The form of the inquiry, however, is crucial. It will not do simply to inquire of individual talesman, or the jury as a whole, whether *they* believe further deliberation will produce a verdict. This necessarily compels the trial court to base his discretion solely upon the opinions of the jurors.[10] It is not surprising, therefore, that the great majority of courts in this country have rejected the federal rule and allowed inquiry into the jury's numerical division.[11] It may be crucial to a proper decision on (a) whether the jury should deliberate further, and (b) for how long; that the trial court know if the jury is split 6-6 on the one hand, or 11-1 on the other.

Even under the federal rule properly applied, however, the action of the trial court in this case would not have been error. For what was done here duplicates almost exactly the experience of the court in *Bowen* v. *United States,* 153 F. 2d 747 (8th Cir. 1946), *cert. denied,* 328 U.S. 835 (1946).

In *Bowen,* the deadlocked jury was called in and the foreman, *unsolicited,* informed the trial judge that the jury was split 11-1. The trial judge then gave an *Allen* charge and sent the jury back. The case involved three

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10. See, e.g., State v. Baker, 293 S.W. 2d 900 (Mo. 1956).

11. Among them Reed v. State, 335 P. 2d 932 (Okla. Crim. 1959); People v. Baumgartner, 332 P. 2d 366 (Cal. App. 1958); Finley v. State, 113 S.E. 2d 144 (Ga. App. 1960); State v. Anderson, 78 N.W. 2d 320 (Minn. 1956); Hooper v. State, 326 S.W. 2d 448 (Tenn. 1959); State v. Baker, 293 S.W. 2d 900 (Mo. 1956); Anderson v. United States, 262 F. 2d 764 (8th Cir. 1959); Beale v. United States, 263 F. 2d 215 (5th Cir. 1959).

defendants, 13 charges apiece, and 34 counts that were submitted to the jury after a two week trial. The jury deliberated 10 hours after receiving the case without reaching a verdict. Holding that the *Brasfield* rule did not govern a case where the revelation of the jury's division was not the result of the court's inquiry, the court of appeals affirmed.

In *Anderson* v. *United States,* 262 F. 2d 764 (8th Cir. 1959), the court of appeals followed *Bowen* in a case where the judge's inquiry revealed that the jury was "pretty evenly" split and the trial court thereafter gave an *Allen* charge. The rationale for this affirmance was that since the jury was evenly split there was no minority to coerce, either by the inquiry or by the additional charge.

In *Beale* v. *United States,* 263 F. 2d 215 (5th Cir. 1959), the court of appeals held that the *Brasfield* rule was "not inflexible" and affirmed a conviction where the trial court's inquiry disclosed that the jury's division was 9-3, the jury was sent back *without* an additional charge and returned a verdict after a short deliberation.

We agree with the rationale of *State* v. *Baker,* 293 S.W. 2d 900 (Mo. 1956). There the court inquired of the jury and learned that it was divided 10-2. The jury was then sent back to deliberate anew. The Supreme Court of Missouri said:

> "We have no doubt that it is common practice in this state, when the jury has deliberated for a considerable time, for the Judge to inquire how they stand numerically, without indicating what party or result they favor, for the purpose of ascertaining whether there is a reasonable probability of an agreement. Authorities differ as to the propriety of such an inquiry

> but we think *the real question is whether there was any coercion of the jury in connection with it.*"[12]

After discussing the *Brasfield* rule, and refusing to follow it, the court concluded:

> "However, our view is that such an inquiry is not *coercive per se* but that it must be determined *from the record* of what is said and done *at the time* whether or not there is any indication of coercion."[13]

In sum then, we have here a protracted trial, lengthy jury deliberations, a trial court's careful inquiry *without* requesting information of the numerical division, the foreman's spontaneous revelation, no additional charge given, and lengthy deliberations thereafter before guilty verdicts (as well as verdicts of acquittal) were reached. Since the record in this case does not even hint of coercion, petitioners' Sixth and Fourteenth Amendment rights to a fair trial by jury were not denied, even under the *Brasfield* rule, and *certiorari* should not be granted to consider this argument.

II.

THE USE OF A PRIOR STATEMENT TO IMPEACH PETITIONER LOMBARDI DID NOT VIOLATE THE REMAINING PETITIONERS' RIGHTS UNDER BRUTON V. UNITED STATES.

Petitioners' other claim of error which they believe merits review by this Court concerns the state's use, on rebuttal, of a converstation between agent Walker (the witness) and petitioner Lombardi (Pet. 12-13). The argument is

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12. 293 S.W. 2d at 905 (Emphasis Added).

13. 293 S.W. 2d at 906 (Emphasis Added).

that such testimony was, in the absence of a severance, forbidden by this Court's decision in *Bruton* v. *United States*, 391 U.S. 123 (1968) (Pet. 18-21).

In *Bruton*, this Court was confronted with a case where Evans and Bruton were jointly tried for the crime of armed postal robbery; a postal inspector testified to an oral confession by Evans which directly implicated Bruton, and Evans did not testify at the trial. This Court held that such a procedure violated Bruton's rights under the Confrontation Clause of the Sixth Amendment because the jury heard evidence of Evan's confession but Bruton was not able to cross-examine the accuser (Evans) since he did not testify. This result was reached, two Justices dissenting, though the jury was explicitly instructed that Evan's confession was to be considered only in determining his, and not Bruton's, guilt or innocence.

Bruton does not govern this case as the court below correctly held (Pet. App. 16-18). Here the evidence of a prior statement was admitted for the single purpose of showing that Lombardi, contrary to his testimony during the defense case in chief, had made a statement inconsistent with that testimony. It was not admitted as substantive evidence of Lombardi's guilt, let alone that of the other petitioners. It did not name them. As to petitioner Lombardi, the jury was scrupulously instructed that the statement was only admitted for impeachment purposes (A. 468). And, most importantly, Lombardi testified, was available for cross-examination, and, in fact, denied making such a statement.

It is clear that as the Illinois courts have held,[14] *Bruton* does not apply to cases where the confessing co-defendant

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14. People v. Somerville, 245 N.E. 2d 461, 465 (Ill. 1969).

takes the stand, testifies and is available for cross-examination by co-defendants. This Court was exact in its holding in that case:

> "Plainly, the introduction of Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, *since Evans did not take the stand.* Petitioner *thus* was denied his constitutional right of confrontation."[15]

And:

> "The unreliability of such evidence is intolerably compounded when the alleged accomplice, *as here, does not testify and cannot be tested by cross-examination.* It was against *such* threats to a fair trial that the Confrontation Clause was directed."[16]

In this case the co-defendant did testify and was available for cross-examination. The out of court statement was offered only for the purpose of impeachment and the jury was so instructed. Since *Bruton* does not forbid this course, *certiorari* should not be granted to consider petitioners' argument.[17]

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15. 391 U.S. at 127-28 (Emphasis Added.).

16. 391 U.S. at 136 (Emphasis Added).

17. Other courts have so interpreted Bruton. See Rios-Ramirez v. United States, 403 F. 2d 1016 (9th Cir. 1968); Santoro v. United States, 402 F. 2d 920 (9th Cir. 1968); Lipscomb v. Maryland, 248 A. 2d 491 (Md. App. 1968); People v. Somerville, 245 N.E. 2d 461 (Ill. 1969).

CONCLUSION

The People of the State of Illinois request that the Petition For Writ of Certiorari be denied.

Respectfully submitted,

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